

ESTATE OF JOAN (JOANNA) HORSECHIEF

IBIA 76-TQ-3

Decided September 29, 1976

Petition to reopen.

Granted.

1. Indian Probate: Reopening: Generally

The Superintendent of an Indian agency is a proper official of the Bureau of Indian Affairs to file a petition for reopening under the authority of 43 CFR 4.242, although he has no interest in the outcome of such petition.

2. Indian Probate: Reopening: Generally--Indian Probate: Wills: Generally--Indian Probate: Wills: Lost Will

An Indian will may be presented for probate even though the estate of the decedent has been distributed as intestate property.

3. Indian Probate: Reopening: Generally

It would be unconscionable for the Secretary of the Interior to fail to give effect to a Departmentally approved will of a deceased Indian which was misfiled by the Agency, unless it can be demonstrated by way of a hearing that the provisions of the will should not be followed.

APPEARANCES: Charlene Lois Fisher Factory, a/k/a Charlene Horsechief, and Mr. and Mrs. Ira Toney, guardians ad litem for Ray Franklin Toney, a/k/a Ray Tenequer, Jr., in opposition to the recommended order.

OPINION BY BOARD MEMBER HORTON

On August 27, 1976, Administrative Law Judge Jack M. Short entered a Recommendation to Reopen Case and Order Suspending Distribution in the Estate of Joan (Joanna) Horsechief, deceased Wichita-Pawnee unallotted. An order determining heirs was filed in this case on August 31, 1970. As no last will and testament of the decedent could be found, the Administrative Law Judge ordered that the trust property be distributed to decedent's 10 surviving children according to the applicable state laws of intestate succession. The recommendation for reopening this case was submitted to the Board after Judge Short was notified by the Superintendent of the Anadarko Agency of the Bureau of Indian Affairs, by letter dated May 13, 1976, that a document which purports to be the last will and testament of the decedent was recently discovered in the agency's files. The newly discovered will is dated April 21, 1967, and its provisions dispose of the decedent's trust property differently than the August 31, 1970, order requiring intestate distribution.

Judge Short's recommended order was docketed by the Board on September 2, 1976. All interested parties, including decedent's heirs at law, were allowed to submit briefs for or against the recommended reopening of decedent's estate through September 27, 1976.

The briefing period granted to interested parties has now expired and the Board has reviewed the comments received. Opposition to the proposed reopening was expressed by Charlene Lois Fisher Factory, a/k/a Charlene Horsechief, and by Mr. and Mrs. Ira Toney, guardians ad litem for Ray Franklin Toney, a/k/a/ Ray Tenequer, Jr. They oppose reopening on grounds that the estate has been closed for more than 3 years and that the property rights granted to decedent's heirs at law should not now be disturbed.

[1] The Board finds no procedural objection to reopening decedent's estate. Judge Short's recommended order treats the Superintendent's letter of May 13, 1976, as a valid petition to reopen decedent's estate in accordance with 43 CFR 4.242(h). This regulation authorizes the Board to reopen an estate closed for more than 3 years where "there exists a possibility for correction of a manifest injustice." It is accepted that the Superintendent of an Indian agency is a proper official of the Bureau of Indian Affairs to file a petition for reopening under the authority of 43 CFR 4.242, although he has no interest in the outcome of such petition. Estate of Marcel Arcasa (Deceased Colville., Allottee No. H-120), 2 IBIA 309 , 81 I.D. 306 (1974); Estate of Rose Josephine LaRose Wilson Eli, 2 IBIA 60, 80 I.D. 620 (1973).

[2] Further, the Board agrees with the legal authority set forth by Judge Short which he uses to conclude that an Indian will may be presented for probate even though the estate of the decedent has been distributed as intestate property. See p. 2, Recommendation to Reopen, citing 3 Bowe-Parker: Page on Wills § 26.26.

[3] While reopening the estate in this case may cause some administrative inconvenience, and, for some of the heirs at law, possible financial disappointment, it would be unconscionable for the Secretary of the Interior to fail to give effect to a Departmentally approved will of a deceased Indian which was misfiled by the Agency, unless it can be demonstrated by way of a hearing that the provisions of the will should not be followed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Superintendent's Petition to Reopen this estate, dated May 13, 1976, be and the same is hereby GRANTED. Accordingly,

IT IS FURTHER ORDERED that the Estate of Joan (Joanna) Horsechief be, and the same is hereby REMANDED to the Administrative Law Judge for appropriate action and proceedings.

Done at Arlington, Virginia.

Wm. Philip Horton
Member of the Board

I concur:

Alexander H. Wilson
Administrative Judge